Nº. 41442-2-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Appellant,

v.

RAYMOND SAMUEL REYNOLDSON,
Respondent.

BRIEF OF RESPONDENT

Appeal from the Superior Court of Pierce County,
Cause No. 06-1-01238-2
The Honorable Bryan E. Chushcoff, Presiding Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Table of Cases

Washington Cases

A. INTRODUCTION

Raymond Reynoldson hereby responds to Brief of Appellant, State of Washington.

B. COUNTER-STATEMENT OF THE CASE

On March 15, 2006, Mr. Reynoldson was charged with one count of kidnapping in the first degree, one count of attempted rape in the first degree, and one count of assault in the second degree. CP 1-2.

Jury deliberations began on September 29, 2010. CP 15-27. During jury deliberations, juror Linda Ortiz expressed her view that the State had not carried its burden of proving the crimes charged. CP 85-95. The other jurors, most of whom had already voted to convict Mr. Reynoldson of the crimes charged, began berating and insulting Ms. Ortiz about her verdict and pressuring her to change her mind. CP 85-95. "Pat," the juror elected to be the foreperson of the jury, believed that if the jury did not return a unanimous verdict the court would declare a mistrial. CP 85-95. Pat and several other jurors made clear to Ms. Ortiz that the jury would remain in the deliberation room until a unanimous verdict was reached. CP 85-95. Ms. Ortiz tried to point out that a mistrial would not be declared and that Mr. Reynoldson would be convicted of lesser crimes, but the other jurors didn't listen to her. CP 85-95.

After the two other jurors who did not believe Mr. Reynoldson was guilty of the crimes charges had succumbed to peer pressure and changed their minds, it was made clear to Ms. Ortiz that the focus of the entire jury was to get her to change her mind. CP 85-95. The other jurors berated and ridiculed Ms. Ortiz, told her she was being immature and childish, and verbally assaulted her. CP 85-95.

On September 30, 2010, Ms. Ortiz contacted the judicial assistant and informed her that she felt the other jurors were not listening to her. She asked if she could be replaced. 10-28-10 RP 14-15; CP 15-27, 109-111.[1] Ms. Ortiz was not removed from the jury. 10-28-10 RP 14-15.

During deliberations, several jurors speculated that Mr. Reynoldson had probably committed crimes like this before, had gotten away with it, and needed to be locked up. CP 85-95. The jurors also made clear that they would not listen to Ms. Ortiz's concerns about the weakness of the State's case and the conflicting evidence. CP 85-95.

Despite not believing Mr. Reynoldson was guilty of the crimes charged, Ms. Ortiz eventually agreed to the guilty verdict because she could no longer tolerate the hectoring she was receiving from the other jurors. CP 85-95. The jury returned verdicts of guilty on all the crimes

[1] The volumes of the report of proceedings are not numbered continuously. For the sake if simplicity, respondent will adopt the State's method of referencing the record by giving the date of the proceeding followed by the page number being referenced.

charged. CP 75, 78, 81. When the jury was polled, Ms. Ortiz lied and said that the verdict was hers. CP 85-95.

Within minutes after the jury was polled and released, Ms. Ortiz called the judicial assistant and told the judicial assistant that she did not feel comfortable with her verdict and that she gave that verdict because she felt browbeaten by the other jurors. 10-29-10 RP 15-16; CP 85-95, 109-111.

On October 5, 2010, Ms. Ortiz provided Mr. Reynoldson's defense counsel with a declaration detailing her experience on the jury and how she had lied when she gave her verdict and said that the verdict was hers when the jury was polled. CP 85-95. In the declaration, Ms. Ortiz made clear that she did not believe the State had carried its burden both at the time the verdict was entered and after the jury was released. CP 85-95. Ms. Ortiz declared that she had lied when she affirmed the guilty verdict when the jury was polled regarding the verdict. CP 85-95. Ms. Ortiz declared that she lied when the jury was polled because she believed that if the verdict was not entered the judge would send the jury back into the deliberation room and she could not stand to be subjected to further abuse from the other jurors. CP 85-95.

On October 7, 2010, trial counsel for Mr. Reynoldson filed a motion for new trial under CrR 7.5(a)(1)(2) and (8) asserting that Mr.

Reynoldson was entitled to a new trial on the grounds that: (a) Mr. Reynolds did not receive a trial by a fair and impartial jury as required by Article 1 § 22 of the Washington Constitution; (b) Mr. Reynoldson's due process right to a unanimous jury verdict under Article 1 § 3 and Article 1 § 21 of the Washington Constitution was violated since Ms. Ortiz believed Mr. Reynoldson was innocent but lied when the jury was polled; (c) jurors committed misconduct and ignored the court's instructions by basing their verdict on speculation that Mr. Reynoldson had committed crimes previously and had "gotten away with it"; and (d) that the conduct of the jurors violated the appearance of fairness doctrine in that the jurors, acting as quasi-judicial" decision makers did not appear to be impartial. CP 85-95.

On October 28, 2010, a hearing was held on Mr. Reynoldson's motion for new trial. 10-28-10, RP 4-31. The trial court found that Ms. Ortiz did not truly believe Mr. Reynoldson was guilty and found that Ms. Ortiz committed misconduct when she voted to convict Mr. Reynoldson and again when Ms. Ortiz indicated that the verdict of guilty was her verdict when the jury was polled. 10-28-10 RP 27. The trial court granted Mr. Reynoldson's motion for new trial on the basis that the jury did not render a unanimous verdict. 10-28-10, RP 28.

On November 10, 2010, findings of fact and conclusions of law on the motion for new trial were filed in Superior Court. CP 109-111.

The State filed a notice of appeal of the court granting of the new trial on November 10, 2010. CP 116-117.

C. ARGUMENT

The trial court granted Mr. Reynoldson's motion for new trial on the ground that Ms. Ortiz committed juror misconduct when she lied and entered the verdict of guilty and lied again when the jury was polled. 10-28-10 RP 27. The trial court found that Ms. Ortiz's lying deprived Mr. Reynoldson of his right to a unanimous jury verdict. 10-28-10, RP 28.

The State appeals the trial court's ruling granting Mr. Reynoldson's motion for new trial arguing that the trial court erred in considering the facts set forth in Ms. Ortiz's declaration since, according to the State, the facts in Ms. Ortiz's declaration inhered in the jury's verdict. State's Opening Brief, p. 12-14. Accordingly, the State also argues that the record does not support the trial court's finding of fact number 5 and conclusions of law number 1-6 on the motion for new trial. State's Opening Brief, p.12.

The State frames the issue on appeal as the trial court abused its discretion in granting Mr. Reynoldson's motion for new trial because the trial court disregarded "well settled case law" in granting the motion.

State's Opening Brief, p. 3. The State's arguments mischaracterize both the trial court's ruling and the nature of the evidence considered by the trial court.

1. Standard of Review.

> The granting or denial of a new trial is a matter primarily within the discretion of the trial court, and the decision will not be disturbed unless there is a clear abuse of discretion. An abuse of discretion occurs only when no reasonable judge would have reached the same conclusion.

State v. Hager, 171 Wn.2d 151, 156, 248 P.3d 512 (2011). Whether jurors are guilty of misconduct is a factual question; the trial court's finding will not be disturbed except for an abuse of discretion clearly shown. *State v. Young*, 89 Wn.2d 613, 630, 574 P.2d 1171, *cert. denied* 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978). Thus, in order for this court to reverse the trial court's order for a new trial, the State must convince this court that no other judge would have ruled as the trial court ruled.

2. The trial court did not abuse its discretion in granting Mr. Reynoldson's motion for new trial.

a. The State misrepresents the law regarding what facts the trial court may rely on in determining if juror misconduct mandates a new trial.

In Washington, the rule regarding whether or not and how juror affidavits can be considered by the trial court in determining whether or

not a new trial should be granted was first announced in *State v. Parker*, 25 Wn. 405, 65 P. 776 (1901):

> Under our Code of Criminal Procedure (Ballinger's Ann. Codes & St. § 6965), it is provided that misconduct of the jury is a ground for a new trial; and section 6966 provides that, when the application for a new trial is made upon that ground, the facts upon which it is based shall be stated in affidavits, as was done in this case. In considering the affidavits filed, we entirely discard those portions which may tend to impeach the verdict of the jurors, and consider only those facts stated in relation to misconduct of the juror, and which in no way inhere in the verdict itself. It is not for the juror to say what effect the remarks may have had upon his verdict, but he may state facts, and from them the court will determine what was the probable effect upon the verdict. It is for the court to say whether the remarks made by the juror in this case probably had a prejudicial effect upon the minds of the other jurors.

Parker, 25 Wn. at 415, 65 P. 776. This rule remains the law in Washington. *Halverson v. Anderson*, 82 Wn.2d 746, 749, 513 P.2d 827 (1973).

Stated another way, in reading the affidavit of a juror regarding potential juror misconduct in the context of deciding whether or not to declare a mistrial, the court must first identify what portions of the affidavit contain information concerning the facts of what occurred and then must identify what portions of the affidavit contain information about the impact those facts had on the jury's verdict. The court must disregard the juror's statements about what impact the facts had on the verdict and,

instead, consider only the underlying facts regarding the misconduct and must make its own determination of whether or not those facts impacted the jury's verdict. *See State v. Forsyth*, 13 Wn.App. 133, 138, 533 P.2d 847 (1975) ("A juror in an affidavit tending to impeach the verdict may only testify to matters which do not inhere in his verdict. That is, the trial court may consider statements of *fact* set forth in the affidavit, but may not consider a juror's statement of the *effect* such facts had upon the verdict.") (Emphasis in original).

Thus, Washington courts have recognized that the facts contained in a juror's affidavit regarding juror misconduct will contain statements regarding facts that both do and do not inhere in the jury's verdict. Statements about facts regarding the underlying alleged juror misconduct can be considered by the court since those facts do not inhere in the jury's verdict. Statements about how the underlying facts of the alleged misconduct impacted the jury's verdict are statements regarding how the facts inhered in the jury's verdict, and, therefore, cannot be considered by the court. In simpler terms, a court may properly consider a juror's description of the facts of the alleged juror misconduct, but the court cannot consider the juror's statements or interpretations of how the misconduct impacted the jury's deliberations and verdict.

Indeed, as pointed out by the State on page 5 of its Opening Brief, the Washington Supreme Court has identified four categories of facts which "inhere" in the jury's verdict and, therefore cannot be considered by the trial court in determining whether or not juror misconduct requires a new trial: (1) the mental processes by which individual jurors reached their respective conclusions; (2) their motives in arriving at their verdicts; (3) the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence; and (4) the jurors' intentions and beliefs. *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 179-180, 422 P.2d 515 (1967), *cited in State v. Jackman*, 113 Wn.2d 772, 777-778, 783 P.2d 580 (1989).

However, the State represents the category of facts which inhere in the jury's verdict too broadly and represents the category of facts the court may properly consider too narrowly.

i. The State misrepresents what type of juror misconduct warrants a new trial.

Citing *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994), the State argues that the only facts which may support a finding of juror misconduct requiring a new trial are facts supporting the conclusion that jurors has considered extrinsic evidence in rendering their verdict. State's Opening Brief, p. 4. The relevant portion of *Balisok* reads as follows:

> A strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.
>
> Nonetheless, the consideration of novel or extrinsic evidence by a jury is misconduct and can be grounds for a new trial. Novel or extrinsic evidence is defined as information that is *outside all the evidence* admitted at trial, either orally or by document. Such evidence is improper because it is not subject to objection, cross examination, explanation or rebuttal.

Balisok, 123 Wn.2d at 117-118, 866 P.2d 631 (internal citations omitted) (italics in original).

The quoted passage from *Balisok* **does *not*** stand for the proposition that the **only** kind of juror misconduct that warrants a new trial is juror consideration of facts not introduced at trial. Rather, a proper reading of *Balisok* is that "the consideration of novel or extrinsic evidence by a jury is misconduct ***and can be*** grounds for a new trial." *Balisok*, 123 Wn.2d at 118, 866 P.2d 631.

The State interprets *Balisok* too broadly. *Balisok* does not hold that the **only** form of juror misconduct that will warrant a new trial is juror consideration of evidence not admitted at trial. Rather, *Balisok* holds that juror consideration of evidence not admitted at trial is **but one type** of juror misconduct that warrants a new trial. The court may consider any form of juror misconduct in determining whether a new trial is granted,

not just whether the jurors looked at evidence outside what was introduced at trial. What the court is prohibited from considering are statements by jurors in affidavits about how the particular juror misconduct affected the jury's deliberations and thought processes regarding the verdict.

ii. The State misrepresents what type of facts the court may consider in determining whether or not juror misconduct warrants a new trial.

Citing *Forsyth*, the State argues that the trial court could not consider the facts in Ms. Ortiz's declaration indicating that Ms. Ortiz lied when she agreed to a verdict of guilty and lied when the jury was polled. State's Opening Brief, p. 11. The State argues this is so because the facts that Ms. Ortiz lied about her verdict and lied when the jury was polled are facts that inhere in the jury's verdict. State's Opening Brief, p. 11-12.

First, the facts that Ms. Ortiz lied about her verdict and lied when the jury was polled are not facts that inhere in the jury's verdict. As stated above, the Washington Supreme Court has identified four categories of facts which "inhere" in the jury's verdict and, therefore cannot be considered by the trial court in determining whether or not juror misconduct requires a new trial: (1) the mental processes by which individual jurors reached their respective conclusions; (2) their motives in

arriving at their verdicts; (3) the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence; and (4) the jurors' intentions and beliefs. *Cox*, 70 Wn.2d at 179-180, 422 P.2d 515. The facts that Ms. Ortiz lied about her verdict and during polling fall into none of these four categories.

Second, *Forsyth* is not applicable here. In *Forsyth*, the defendant sought a new trial on the basis of a juror affidavit indicating that the juror had been had been a holdout for acquittal but changed her verdict after being pressured by other jurors. *Forsyth*, 13 Wn.App. at 138, 533 P.2d 847. The juror's affidavit indicated that she had been very ill during deliberations and her doctor told her to "take it easy." *Forsyth*, 13 Wn.App. at 138, 533 P.2d 847. The juror's affidavit testified that she would have not voted guilty and held out for an acquittal but for her illness and her doctor's advice. *Forsyth*, 13 Wn.App. at 138, 533 P.2d 847. The Court of Appeals held that the trial court properly denied the defendant's motion for new trial on the basis of juror misconduct since the effect of juror's illness inhered in her verdict. *Forsyth*, 13 Wn.App. at 140, 533 P.2d 847.

Here, the trial court found juror misconduct based solely on the facts that Ms. Ortiz lied about her verdict and lied when the jury was polled. The trial court did not base its ruling on any of the reasons ***why***

Ms. Ortiz lied about her verdict, only that she ***did*** lie about her verdict. The trial court's ruling was not based on any facts which inhered in the jury's verdict, only on the facts that Ms. Ortiz committed misconduct and that such misconduct deprived Mr. Reynoldson of his due process right to a unanimous jury verdict. The State's assertion that the trial court could not base its ruling on the fact that Ms. Ortiz lied about her verdict is incorrect and fails.

The State's assertion that the only juror misconduct that warrants a new trial is the consideration of evidence not admitted at trial is incorrect and contrary to Washington law. Further, the State's assertion that the only facts the trial court may consider in determining whether a new trial is required is whether or not the jury considered evidence not admitted at trial is also incorrect and contrary to Washington law. As discussed, above, the law in Washington is that the consideration of evidence not in the record is but one category of juror misconduct which may be the basis for a new trial. The court may consider any juror misconduct and weigh the facts of the case to determine if the misconduct warrants a new trial. Here, the trial court properly considered the facts that Ms. Ortiz lied in rendering her verdict and lied when the jury was polled as a basis for a new trial.

b. The State misrepresents the law concerning whether or not polling the jury cures any error in regards to whether the jury was unanimous in reaching its verdict.

The State argues that any error caused by Ms. Ortiz lying about her verdict was cured because the jury was polled, even though Ms. Ortiz lied then too. State's Opening Brief, p. 10. In support of this argument, the State cites: *State v. Havens*, 70 Wn.App. 251, 257, 852 P.2d 1120, *review denied*, 122 Wn.2d 1023, 866 P.2d 39 (1993); *State v. Badda*, 63 Wn.2d 176, 182, 385 P.2d 859 (1963); and *Butler v. State*, 34 Wn.App. 835, 838, 663 P.2d 1390, *review denied* 100 Wn.2d 1009 (1983). These cases are factually distinguishable from Mr. Reynoldson's case and do not support the State's argument.

Butler was a civil wrongful death case. The issue before the court was whether or not the jury could have known it had reached a verdict where the votes were cast by secret ballot. *Butler*, 34 Wn.App. at 836, 663 P.2d 1390. The trial court found that the jury could not have reached a verdict if voting was by secret ballot and granted a new trial. *Butler*, 34 Wn.App. at 836, 663 P.2d 1390. The Court of Appeals reversed, holding that, "if the jurors did not know in the jury room whether they had reached a verdict-and therefore arguably had not-they did know when each heard the others answer the poll-and therefore they had reached a verdict at that

point." *Butler*, 34 Wn.App. at 838, 663 P.2d 1390. Thus, *Butler* stands for the proposition that polling the jury eliminates the possibility that the jury had not reached a final verdict if the method of voting employed by the jury left that issue unclear. *Butler* does not address the situation where a juror admits she lied both when voting during deliberations and during polling. In this case it is clear that the jury reached a verdict, but it is also clear that that verdict was the result of a juror lying. *Butler* is inapplicable to the facts of this case.

In *Badda*, the defendant challenged the validity of the jury verdict since the trial court failed to give the jury a unanimity instruction. *Badda*, 63 Wn.2d at 181, 385 P.2d 859. In reaching its decision, the Supreme Court emphasized its holding in *State v. Mickens*, that "since the jury was polled, there is no doubt that the verdict *was* unanimous and *was* the result of each juror's individual determination." *Badda*, 63 Wn.2d at 182, 385 P.2d 859 (emphasis in original), *citing Mickens*, 61 Wn.2d 83, 87, 377 P.2d 240 (1962). Ultimately, however, and irrespective of *Mickens*, the *Badda* court reversed the conviction and remanded for a new trial on grounds that, on the facts of the case, the court could not view the record as showing unanimity due to the number of defendants, charges per defendant, and number of special verdicts. *Badda*, 63 Wn.2d at 182-183, 385 P.2d 859. Thus, *Badda* stands for the proposition that polling the jury

usually creates a presumption that the jury reached a unanimous verdict, but that the facts of a case may be such that this presumption can be overcome.

Unlike Mr. Reynoldson's case, *Badda* did not deal with a situation where the jury's verdict was challenged on the basis that the verdict was obtained by a juror lying in the jury room and lying again when the jury was polled. The facts of Mr. Reynoldson's case are such that the "*Mickens* presumption" that polling the jury confirms the unanimity of the jury is overcome. There is no question that the verdict returned by the jury was "unanimous" and that the jury was polled and the polling confirmed the "unanimity" of the jury in the sense that the verdicts returned by all jurors matched. However, there is also no question that this unanimity was achieved because Ms. Ortiz lied about her verdict. Thus, Ms. Ortiz's lying about her verdict and lying when the jury was polled invalidates the presumption that the jury's verdict was truly unanimous.

In *Havens,* the defendants challenged the unanimity of the jury verdict based on an affidavit from a juror that suggested that the jury was not unanimous as to the specific date the misconduct occurred. *Havens*, 70 Wn.App. 251, 255, 852 P.2d 1120. Citing *Butler* and *Badda*, the Court of Appeals dismissed the defendant's challenge and held that "any defect

in the voting procedure was cured by the jury poll." *Havens*, 70 Wn.App. at 257, 852 P.2d 1120. Thus, *Havens* stands for the principle that where there is a question as to jury unanimity regarding the date a particular crime was committed, polling the jury cures any potential defect in the jury's voting procedure.

Havens, *Badda*, and *Butler* are factually distinguishable from Mr. Reynoldson's case and are simply inapplicable to a situation where it is a known fact that a juror lied in voting to find the defendant guilty and lied when the jury was polled. None of the cases cited by the State stand for the proposition that polling the jury will jury render a verdict unanimous where one of the jurors is lying about her verdict. The State's Opening Brief misrepresents the law regarding the impact of polling the jury on the facts of this case.

The polling of the jury in this case simply did nothing to ensure that the jury's verdict was unanimous and correct since Ms. Ortiz lied again when the jury was polled.

c. The State mischaracterizes the facts the trial court relied on in granting Mr. Reynoldson's motion for new trial.

The State fills a great portion of its Opening Brief with recitations of the law regarding what information contained in a juror's declaration the trial court may consider in ruling on a motion for new trial based on

juror misconduct. State's Opening Brief, p. 4-11. It is true that Ms. Ortiz's affidavit contains many details about how she felt pressured and bullied by the other jurors and even information about how members of the jury speculated that Mr. Reynoldson had probably committed similar crimes before and gotten away with it so he needed to be punish this time. CP 85-95. It is also true, as the State points out at length, that the trial court could not properly consider such facts in determining whether or not juror misconduct required Mr. Reynoldson be granted a new trial.

However, a review of the trial court's decision reveals that much of the authority provided by the State is irrelevant to this case because the trial court *did not* base its determination that juror misconduct required a new trial on facts that inhered in the jury's verdict. In its oral ruling, the trial court made clear that it found that Ms. Ortiz never believed Mr. Reynoldson was guilty as charged and that she committed misconduct when she lied about her verdict and committed misconduct a second time when she lied when the jury was polled. 10-28-10 RP 27. The trial court granted Mr. Reynoldson's motion for new trial on the basis that Ms. Ortiz's misconduct deprived Mr. Reynoldson of his right to a unanimous jury verdict. 10-28-10 RP 28.

Thus, the trial court's ruling was based not on facts which inhered in the jury's verdict, but, rather, on the facts detailing juror misconduct.

The trial court's ruling was based on the fact that Ms. Ortiz committed misconduct, not on how her misconduct affected the deliberations or thought processes of the jury.

d. The State mischaracterizes the nature of Ms. Ortiz's misconduct in this case.

The State characterizes Ms. Ortiz as a juror who suffers from "buyer's remorse" and likens this case to other cases in Washington where jurors have had a "post-verdict change of heart." State's Opening Brief, p. 6-7, 12-13. This characterization is incorrect. Ms. Ortiz did not vote one way and then change her mind post-trial. Ms. Ortiz made up her mind during deliberations and then lied about her verdict when the jury voted and when the jury was polled. Ms. Ortiz did not have a post-verdict change of heart.

Building on the mischaracterization of Ms. Ortiz's actions, the State cites numerous cases to support its argument that "Washington courts have a long record of dismissing claims of jurors' post-verdict change of heart. State's Opening Brief, p. 6. In support of this argument, the State cites *State v. Maxfield*, 46 Wn.2d 822, 828, 285 P.2d 887 (1955); *State v. Gay*, 82 Wn. 423, 144 P. 711, 716 (1914); *State v. Marks*, 90 Wn.App. 980, 983, 955 P.2d 406, *review denied* 136 Wn.2d 1024, 969 P.2d 1063 (1998); *State v. Hoff*, 31 Wn.App. 8909, 813, *review denied* 644

P.2d 76397 Wnb.2d 1031 (1982); and *State v. Hughes*, 14 Wn.App. 186, 540 P.2d 439, *review denied* 86 Wn.2d 1006 (1975). State's Opening Brief p. 6-7. However, these cases are distinguishable from Mr. Reynoldson's case and none of them support the State's argument.

i. State v. Maxfield

In *Maxfield, inter alia*, the defendant moved for a new trial on several grounds of juror misconduct. The first ground of alleged misconduct of the jury was based upon an affidavit of counsel, stating that he had interviewed several members of the jury and was informed by one juror that the juror did not think the defendant was guilty, but the juror so voted because the last two ballots came so fast that the juror was pressured into changing his mind. *Maxfield*, 46 Wn.2d at 828, 285 P.2d 887. The second ground was that several jurors had "glanced" at a newspaper account of the trial. *Maxfield*, 46 Wn.2d at 829, 285 P.2d 887. The trial court granted the motion and the State appealed. *Maxfield*, 46 Wn.2d at 823, 285 P.2d 887.

The Washington Supreme Court reversed the trial court's grant of the motion for new trial. *Maxfield*, 46 Wn.2d at 829, 285 P.2d 887. With regards to the first basis for the new trial, the Supreme Court found this argument lacked merit for three reasons: the attorney's affidavit was hearsay and incompetent to impeach the verdict of the jury; a juror cannot

impeach his own verdict by saying he was pressured into the verdict; and the Supreme Court could not consider the affidavit because it was not included in the statement of facts sent to the Supreme Court. *Maxfield*, 46 Wn.2d at 828-829, 285 P.2d 887. Relevant here is the Supreme Court's finding that a juror cannot impeach his own verdict by an affidavit alleging that the juror only voted guilty because of pressure from other jurors. *Maxfield*, 46 Wn.2d at 828-829, 285 P.2d 887. This holding is nothing more than a restatement of the principle that a court cannot consider facts that inhere in the jury's verdict in determining whether or not juror misconduct was committed. *See Forsyth*, 13 Wn.App. at 138, 533 P.2d 847 ("A juror in an affidavit tending to impeach the verdict may only testify to matters which do not inhere in his verdict. That is, the trial court may consider statements of *fact* set forth in the affidavit, but may not consider a juror's statement of the *effect* such facts had upon the verdict.")

The State misinterprets *Maxfield*. Contrary to the State's assertions, *Maxfield* **does not** stand for the proposition that Washington courts will always reject a juror's affidavit which impeaches that juror's verdict. Rather, *Maxfield* is simply another case holding that the court cannot consider facts contained in the juror's affidavit which inhere in the

juror's thought processes regarding verdict, such as the fact that the juror was pressured into his or her verdict by peer pressure.

ii. State v. Hoff.

The pertinent facts of *Hoff* are nearly identical to those of *Maxfield* and *Forsyth*. The State appealed a post-trial grant of the defendant's motion for new trial predicated, among other arguments, on the argument that a juror had been pressured into the guilty verdict. *Hoff*, 31 Wn.App. at 809-811, 644 P.2d 763. The juror provided an affidavit indicating that she juror was sick during deliberation and that other jurors pressured her to vote to convict the defendant. *Hoff*, 31 Wn.App. at 813, 644 P.2d 763. Citing *Forsyth*, the court of appeals reversed the trial court's grant of the new trial:

> The effect of a juror's illness and the claimed pressure by others inheres in the verdict and may not be used to impeach the verdict. *State v. Forsyth*, 13 Wn.App. 133, 138, 533 P.2d 847 (1975). In a motion to set aside a verdict and grant a new trial, the verdict cannot be affected either favorably or unfavorably by the fact that one or more jurors assented because of weariness, illness or importunities. *Gardner v. Malone*, 60 Wn.2d 836, 841, 376 P.2d 651 (1962). Public policy forbids inquiries into the privacy of the jury's deliberations. *State v. Gay*, 82 Wn. 423, 439, 144 P. 711 (1914).

Hoff, 31 Wn.App. at 813, 644 P.2d 763. Thus, like *Maxfield* and *Forsyth*, *Hoff*, contrary to the State's assertion, **does not** stand for the proposition that Washington courts will always reject a juror's affidavit which

impeaches that juror's verdict. Rather, *Hoff* is just another case holding that the court cannot consider facts contained in the juror's affidavit which inhere in the juror's thought processes regarding verdict, such as the fact that the juror was pressured into his or her verdict by peer pressure.

iii. State v. Hughes.

In *Hughes*, the defendant's appealed their convictions of conspiracy to deliver marijuana and argued, *inter alia*, that the trial court erred in refusing to consider affidavits the defendants had obtained from several jurors in support of the defendant's motion for new trial. *Hughes*, 14 Wn.App. at 187-190, 540 P.2d 439. The affidavits indicated that the jurors found the defendants guilty after finding the defendants knew the substance was catnip and intended to misrepresent it as marijuana, rather than finding the defendants intended to deliver marijuana. *Hughes*, 14 Wn.App. at 189-190, 540 P.2d 439. Again, citing *Forsyth*, the Court of Appeals held that the trial court correctly refused to consider the affidavits:

> The trial court may receive and consider the affidavit of any person who is competent to make an affidavit in support of or against a motion for a new trial insofar as such affidavit shows facts in relation to misconduct of a juror; But the court may not consider such affidavits as to those things which inhere in the verdict. *Dibley v. Peters* (1938), 200 Wn. 100, 93 P.2d 720.

> A verdict will not be disturbed on the basis of jurors' assertions relating to their thought processes in reaching a verdict and reveals at most, error in the verdict itself. *Ryan v. Westgard*, 12 Wn.App. 500, 530 P.2d 687 (1975); *State v. Forsyth*, 13 Wn.App. 133, 533 P.2d 847 (1975).

Hughes, 14 Wn.App. at 190, 540 P.2d 439.

Yet again, as with *Maxfield* and *Hoff*, the State has cited a case which, when actually read and analyzed, does not support the argument for which it is cited. Like *Maxfield* and *Hoff*, *Hughes* is yet another case holding that the court cannot consider facts contained in the juror's affidavit which inhere in the juror's thought processes regarding verdict, such as the juror's thought processes in reaching the verdict.

iv. State v. Marks.

In *Marks*, the trial court granted the defendant's post-trial motion for new trial after talking informally with the jury and determining that the jury was confused over whether a missing witness instruction applied to an absent State witness or an absent defense witness. *Marks*, 90 Wn.App. at 982, 955 P.2d 406. The State appealed and the Court of Appeals reversed the trial court's order granting the new trial. *Marks*, 90 Wn.App. at 982, 955 P.2d 406.

Beyond discussing the standard applicable to reversing a trial court's grant of a motion for a new trial (*Marks*, 90 Wn.App. at 984-985, 955 P.2d 406), *Marks* has nothing to do with the issue the State cites it for

and is irrelevant to the determination of the instant case. The State cites to page 983 of *Marks* to support its argument that "Washington courts have a long record of dismissing claims of jurors' post-verdict change of heart," but page 983 of *Marks* is the recitation of the facts of the case. *Marks*, 90 Wn.App. at 984-985, 955 P.2d 406.

Marks simply does not discuss how a trial court should deal with an affidavit of a juror indicating the juror has changed their mind about the verdict or that the juror lied when entering the verdict. *Marks* does not support the argument it is cited for in the State's Opening Brief and is irrelevant to this case.

v. State v. Gay.

The only case cited by the State which might arguably support the State's argument is *State v. Gay*. In *Gay*, the court wrote:

> If the juryman making the affidavit actually believed that the evidence did not justify a verdict of guilty, it was a gross wrong on his part, for any consideration of personal convenience, or any consideration of convenience to the defendant, to compromise with the other members of the jury and agree on a verdict of guilty. The only verdict he could conscientiously render in keeping with his oath was one of not guilty. He therefore violated his oath either in returning the verdict, or in making the affidavit after the return of the verdict. When he so violated it cannot, of course, be ascertained without an inquiry into the privacy of the jury's deliberations. But public policy forbids such inquiries. To permit it would encourage tampering with jurymen after their discharge, would furnish to corrupt litigants a means of destroying the effect of a verdict

> contrary to their interests, and would weaken the public regard for this ancient method of ascertaining the truth of disputed allegations of fact. But few verdicts are reached in which some juryman does not yield in some degree his opinions and convictions to the opinions and convictions of others. And when he does so, even in criminal cases, it is to the interest of the public that he be not permitted thereafter to gainsay his act.

Gay, 82 Wn. at 439, 144 P. 711.

Thus, while recognizing that a juror who lies about his or her verdict commits a "gross wrong," *Gay* appears to hold that if a juror lies when he or she renders a verdict, and then submits an affidavit admitting that the juror lied, public policy forbids the court from considering the affidavit since consideration of the affidavit would necessarily involve inquiring into the jury's deliberations. The *Gay* court held that such inquiries should not be permitted because it would "encourage tampering with jurymen after their discharge, would "furnish to corrupt litigants a means of destroying the effect of a verdict contrary to their interests," and would weaken public regard for the jury trial process. *Gay*, 82 Wn. at 439, 144 P. 711.

In the near 100 years since *Gay* was decided, the law regarding juror affidavits impeaching jury verdicts has changed. Insofar as *Gay* relied on the public policy of forbidding inquiry into the jury's deliberations to hold that a juror's affidavit cannot be considered to

impeach the jury's verdict, it has been seperceded by later cases. For example, in *Balisok* the court held that "A strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury." *Balisok*, 123 Wn.2d at 117-118, 866 P.2d 631. Further, the *Hoff* court characterized the holding of *Gay* as being that "Public policy forbids inquiries into the privacy of the jury's deliberations." *Hoff*, 31 Wn.App. at 813, 644 P.2d 763. *Hoff* did not recognize *Gay* as prohibiting all inquiries into how juror misconduct might have invalidated the jury's verdict. Rather, *Hoff* interpreted *Gay* as only forbidding inquiries into the jury's deliberations, **not** as forbidding inquiried into juror misconduct which might invalidate a verdict.

Thus, while there is still a public policy favoring "secret, frank and free" jury deliberations, a jury verdict ***can*** be impeached by affidavits from the jurors where the affidavits contain a "strong, affirmative showing of misconduct." *Balisok*, 123 Wn.2d at 117-118, 866 P.2d 631. Insofar as *Gay* stands for the proposition that a juror's affidavit can never be used to impeach a jury's verdict, *Gay* has been superceded by later cases.

As discussed above, the current state of the law in Washington is that a juror's affidavit ***may*** be used to impeach the jury's verdict with regards to whether or not juror misconduct requires a new trial but that the

trial court may only consider the facts contained in the affidavit that discuss the misconduct. Subsequent developments in Washington law have rendered *Gay* a derelict on the seas of jurisprudence.

The State mischaracterizes Ms. Ortiz's misconduct in this case when it argues that Ms. Ortiz voted to find Mr. Reynoldson guilty but had a post-verdict change of heart. Ms. Ortiz's declaration makes clear that she never believed Mr. Reynoldson was guilty as charged and lied during jury deliberations and the polling of the jury. Thus, the State both mischaracterizes the nature of Ms. Ortiz's actions and misstates the law potentially applicable to her actions.

e. The trial court did not abuse its discretion in finding that Mr. Reynoldson was entitled to a new trial where his right to a unanimous jury verdict was violated by juror misconduct.

Our state constitution protects a criminal defendant's right to due process and a unanimous jury verdict. *State v. Depaz*, 165 Wn.2d 842, 204 P.3d 217 (2009), *citing* Const. art. I, §§ 3, 21, 22; *see State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994) ("Criminal defendants in Washington have a right to a unanimous jury verdict."). A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); *State v.*

Bautista–Caldera, 56 Wn.App. 186, 190, 783 P.2d 116 (1989), *review denied*, 114 Wn.2d 1011, 790 P.2d 169 (1990).

Here, Ms. Ortiz's affidavit makes clear that she lied when she rendered her verdict and lied a second time when the jury was polled. Ms. Ortiz's actions made the trial court's entering the verdict of the jury a violation of Mr. Reynoldson's right to a unanimous jury verdict. It is unquestioned that a juror commits misconduct when that juror lies about her verdict and lies again when the jury is polled.

Contrary to the State's arguments, the trial court could consider the facts that Ms. Ortiz lied when voting to convict Mr. Reynoldson and lied again when the jury was polled since those facts did not inhere in the jury's verdict. The facts that Ms. Ortiz lied are facts describing the juror misconduct, ***not*** facts describing the jury's mental processes. Thus, the facts introduced ***were*** sufficient to support the trial court's finding of fact number 5 and all of the conclusions of law.

Given the primacy of a criminal defendant's right to a unanimous jury verdict, and given the universal societal expectation that a criminal defendant can only be convicted by a unanimous jury, the trial court did not abuse its discretion in granting Mr. Reynoldson's motion for new trial. Under the facts of this case, it would be the height of irony for any other ruling to be rendered.

The jury was instructed that, as officers of the court, they should not have let their emotions overcome their rational thought process, could not base their decision on personal preference, and were to act impartially to reach a proper verdict. CP 29-31. In jury instruction 38 the jury was instructed to deliberate in an effort to reach a unanimous verdict but that each juror must decide the case for himself or herself. CP 68. Instruction 38 also directed the jurors to not change their mind just for the purpose of reaching a verdict. CP 68.

Ms. Ortiz's affidavit makes clear that she failed to follow these instructions. In a legal system where a jury is presumed to follow the trial court's instructions (*State v. Yates*, 161 Wn.2d 714, 763, 168 P.3d 359 (2007)), for the court to rule that a jury verdict was valid where it was known that the juror had ignored the court's instructions and lied about her verdict would be hypocrisy in the extreme. Such a result would seriously erode the trust of the public in the legal system achieving just results.

The trial court reached a just and correct verdict in this case. Not only did it protect and preserve Mr. Reynoldson's constitutional right to a unanimous jury verdict but it preserved the public's trust in the trial system. The trial court did not abuse its discretion in granting Mr. Reynoldson a new trial.

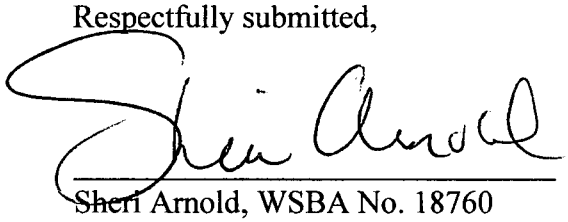
D. CONCLUSION

The State fails to cite authority supporting its argument that the trial court could not consider Ms. Ortiz's affidavit. The facts contained in Ms. Ortiz's affidavit that she lied in rendering her verdict and lied when the jury was polled could be considered by the trial court. Accordingly, there was sufficient evidence in the record to support finding of fact number five as well as all the conclusions of law. The trial court did not abuse its discretion in ordering Mr. Reynoldson be granted a new trial.

For the reasons stated above, this court should affirm the ruling of the trial court.

DATED this 23rd day of June, 2011.

Respectfully submitted,



Sheri Arnold, WSBA No. 18760
Attorney for Respondent

Certificate of Service

The undersigned certifies that on this date she delivered in person to the Pierce County Prosecutor's Office, County City Building, 910 Tacoma Avenue South, Tacoma, Washington 98402, and by United States Mail to Raymond S. Reynoldson, DOC # 98414, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, Washington 98520.

Norma Kinter